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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MARION NAMENWIRTH,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

This matter arose out of a tenure denial at the University of Wisconsin-Madison. Petitioner, Marion Namenwirth, was a female probationary faculty member in the Zoology Department at the University who was denied tenure. She

filed a suit under Title VII alleging that her failure to achieve tenure was on account of her sex. After a lengthy trial and testimony before a magistrate, consented to by the parties, the district court issued findings of fact, conclusions of law, and a decision in favor of the university.

The district court's findings included findings on comparative testimony involving male faculty, and findings on matters alleged by Namenwirth to have been instances of disparate treatment, as well as the findings that the articulated reasons were not pretextual. The circuit court held that the district court's findings were sufficient and were not clearly erroneous.

REASONS FOR DENYING THE WRIT

I. The Use Of Subjective Criteria Judgments In Tenure Determinations Does Not Offend Title VII.

The petitioner asserts that this court should grant certiorari to review the deference allowed in federal decisions to the opinions of university faculty when they are making tenure judgments which involve the evaluations of the research and performance of probationary faculty. Presumably the petitioner would have this court reject such deference.

Federal circuits that have considered the role of tenure in the context of Title VII have accepted the uniqueness of the tenure decision and such courts have been attentive to the factors that make the tenure determination unique. Zahorik v. Cornell University, 729 F.2d 85 (2nd Cir. 1984);

Lieberman v. Gant, 630 F.2d 60 (2nd Cir. 1980).

Justice Powell in his concurring opinion in Hishon v. King & Spalding, 81 L.Ed.2d 59, 70 n. 4 (1984) noted:

> [T]he courts of appeals generally have acknowledged that respect for academic freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenured positions.

Unlike most employment determinations the decision on tenure, particularly at a ranking university such as the University of Wisconsin-Madison, is an absolute judgment made in the context of the individual's particular and often unique record of scholarship and in the context of the often unique attributes that an individual can bring to the academic setting. The tenure

decision is virtually a lifetime appointment.

At a major research institution such as the University of Wisconsin-Madison, the evaluation of the qualifications of a tenure candidate will necessarily involve substantial subjective elements. Contrary to the comment by the dissenting judge, the tenure determination is different than other employment determinations and that difference has been recognized in settled federal decisional law on the application of Title VII.

The tenure determination, particularly the searching inquiry by the Divisional Committee, was an effort to select, not the adequate, but the finest from among the best. The University of Wisconsin-Madison, and in particular the Divisional Committee, was not interested in tenuring an adequate researcher, but

rather interested in tenuring a researcher who met the standard demanded by a department considered one of the top departments in the nation.

In recognizing the difficulties inherent in a tenure determination, and further recognizing the inherent difficulty faced by a court when the discrimination claim involves assertions against faculty judgment of research potential and/or research achievement in specialized areas, the circuit was simply recognizing the deference accorded and the difficulty in second-guessing the judgment of a faculty committee comprised of experts. In the tenure evaluation the Departmental and Divisional Committees act in part as judges and in part as experts. They are asked to apply not only their own acknowledged expertise, but to apply it to a necessarily

subjective concept of future research potential over the future career of the candidate. Where a group of faculty experts makes an evaluation in an area in which there can be disagreement, the judgments of those faculty are entitled to deference unless those judgments are beyond the area of reasonableness. Faculty members such as Professor Abrahamson, Professor Borisey, Professor Ris, Professor Auerbach were all recognized experts in the field.

In the traditional employment event there is a choice made between similarily experienced and/or qualified individuals in a relatively close time frame. In this instance the focus of the comparison, and certainly the thrust of the dissenting judge's points, were directed at the tenure determination made in the case of Professor Timothy Moermond.

Moermond was an ecologist, a specialist in ornithology whose work, research, and research anticipation were dissimilar to Marion Namenwirth's. They were considered at different times and upon records based upon different times. Because of the appeals taken, Namenwirth's rejection did not occur at the Divisional Committee level until 1979, but that decision was on a record completed in 1977. It would be astounding under the circumstances if a group of more than twenty faculty did not evidence some differences in their approaches to the tenure issues between the two candidates at different times.

One clear difference between Timothy Moermond and Marion Namenwirth was in outside research support at the time of the tenure determination. Marion Namenwirth did not have outside grant

support for continuing research as of the time for tenure; Timothy Moermond received an award of a research grant during the tenure process which swayed enough votes on the Divisional Committee for his tenure. The district court made specific findings that the presence of grant support was considered essential to a scientist's future research [the test for tenure was research potential]; that Marion Namenwirth had no significant grant support for her research from outside the University; that Moermond received information of the funding of a grant from an outside source; and that this information conveyed to the Divisional Committee swayed enough votes for this tenure grant.

There was and is no basis for the assertion by the dissenting judge that "only sex" explains the different results

in tenure between Marion Namenwirth and Timothy Moermond. The entire process, including the effort by the court to compare different specialities, considered at different times, on obviously and necessarily subjective criteria, demonstrates the legitimacy of the deference afforded to tenure determinations.

Interestingly, there is no suggestion that Marion Namenwirth should have been considered in a comparison with a male faculty member in the same department who was considered and tenured in the same year as Marion Namenwirth. That individual, Professor Kitchell, had a total of nineteen (19) publications as of his third year of probation and large amounts of outside grant support. It is in the closer calls that the subjective elements play a more crucial role. In an

area as crucial to the university as tenure, such second-guessing is inappropriate and the deference afforded proper.

II. The District Court Made Appropriate Findings Concerning Pretext.

The petitioner takes issue with the acceptance by the circuit court of the district court's findings of fact and conclusions of law. Petitioner focuses on language in some of the findings that the decisions of the University committees and the Dean were "reasonable."

In Anderson v. Bessemer City, 84 L.Ed.2d 518 (1985), this Court set forth the test to be applied by a circuit court reviewing the findings of a district court. In Anderson, a Title VII case, this court reaffirmed the role of the district court as the determiner of the essential factual matters in an action.

In this case as in Anderson, the district court did not "uncritically" accept the findings proposed by the parties, but rather issued its own findings after careful consideration of the submissions from both parties and after having heard extensive testimony. The majority of the circuit fulfilled its proper role under Anderson by accepting and upholding the findings made by the district court.

The specific findings by the district court included findings:

a) That she had a full and fair opportunity to present any materials in favor of her tenure to the committees and to correct any errors or omissions in the record forwarded by the Department to the Divisional Committee;

b) That grant support was essential to a scientist's future research, and the absence an impediment;

c) That Namenwirth did not have significant grant support for continuing research from outside the university; and that the grant for Moermond resulted in his tenure;

d) That the university articulated a reason for the denial of tenure that was not related to sex;

e) That the determination by a sizeable minority of the department was not a pretext;

h) That had Namenwirth been a man in the same circumstances the decision of the sizeable minority of the Divisional Committee would have been the same, to deny tenure;

i) That the decisions by the Divisional Committees that Namenwirth did not meet the standards for tenure was not a pretext, and had she been a man in the same circumstances the decision of the

Divisional Committee would have been the same, to deny tenure;

k) That had Namenwirth been a man in the same circumstances the decision of the Dean denying tenure would have been the same, to deny tenure, and that the decision was not a pretext;

The district court also, in the discussion immediately following the findings, enumerated contentions made by Namenwirth of allegedly differential treatment, and concluded that the proffered evidence did not show that the tenure decision makers acted with the purpose of discriminating against her on the basis of sex. The district court's discussion continued that the articulated reason was the "true and genuine" basis for the tenure denial, and that the denial of tenure was "genuinely based upon a commitment to scientific

excellence and not upon adherence to illegal sex-based animus."

The circuit court majority addressed itself properly to a review of the district court's findings under the standards articulated in Anderson, and concluded that the findings were not clearly erroneous.

Any fair reading of the district court's findings shows the district court did apply the proper standard-articulated reason, not pretextual. It was not inappropriate, in the context of the tenure determination, for the district court to have considered whether or not the decisions of the various committees and the dean were "reasonable" and/or "non-arbitrary." At worst those additional findings beyond non-pretext were inoffensive additions. More particularly, those findings reflected

the uniqueness of the tenure process. A university, including this university, does not decide tenure in a monolithic manner. Rather the often argumentative and contentious groups of scholars consider a "record" and make a determination, a judgment, applying standards that necessarily contain broad and subjective elements. For the tenure process to function, some latitude must be given for the room in which reasonable faculty could disagree. The district court recognized this attribute in its finding that "reasonable persons engaged conscientiously in an effort to apply the standard to a particular candidate ... could reasonably differ in their conclusions." Directly reflecting the problem posed in the department's examination of Namenwirth's record in 1977, as a laboratory biologist, with

Timothy Moermond's record in 1979, as an ecologist, the district court further found that "any one person conscientiously engaged in an effort to apply the standard to different tenure candidates over a period of time could reasonably apply the standard somewhat unevenly among the candidates." The district court also found that there are differences between the specialty fields of Namenwirth and Timothy Moermond, and that ecologists are generally field researchers.

It is in the context of the deference accorded to academic tenure determinations that the district court applied a reasonableness test. In effect other courts have done likewise in determining that deference is due to the reasonably made determinations of academic faculty.

In addition to suggesting a substitution of his own views of the record for the district court's views, the dissenting judge implicitly would have rejected the district court finding that the standard for tenure could be properly applied differently by faculty to different candidates over different times, and that there were differences in the disciplines, which could cause some difference in the approach taken by such faculty decision makers.

III. The District Court Applied The Proper Test.

The petitioner contends, assertedly relying on language in the separate opinion of Justices Blackmun and Brennan in U.S. Postal Service Bd. of Govs. v. Aikins, 460 U.S. 711 (1983), that even if the university articulated a non-discriminatory reason that was determined

to be non-pretextual, the district court should have accepted other indirect proof based upon alleged differences in Namenwirth's experiences and the experiences of some other, male, faculty. Petitioner appears to take the language from the separate opinion out of context. The separate opinion concludes: "[T]he McDonnell Douglas framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision." At page 718. The necessary converse is that the defendant prevail when the legitimate, nondiscriminatory reason given by the employer is in fact the true reason for the employment decision. Even assuming petitioner's

argument has any merit under Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the district court did in fact deal with those alleged differences. The district court's findings addressed most of the assertions:

a) To the group of assertions of differences in the manner in which the process was conducted for Namenwirth, the district court held that the report from the department was proper, "anything less [than the frank report] would have been disingenuous"; and found that Namenwirth had a full and fair opportunity to be heard.

As the detailed findings indicate, the distinctions in the processes were the result of proper differences that reflected the careful attention given by

the committees to Namenwirth's tenure, and the numerous appeals that Namenwirth pursued.

b) To the collection of contentions made by Namenwirth that she was not accepted socially in the department, the district court found that the interactions between the faculty members were generally informal and conditioned by physical proximity, or common laboratories, and that although her opportunities for such informal interactions were reduced by her office and lab locations, her relations with her colleagues were cordial. The district court also found that the members of the department were housed in disparate geographic locations on the campus, and that for many members of the department the weekly faculty meetings were their only contact.

c) Concerning various assertions about the number and identity of outside reviewers, the district court found that some of the names had been suggested by Namenwirth, and that when it appeared that her tenure might encounter difficulty, Professor Auerbach suggested that two additional reviewers be selected, one of whom was Namenwirth's former major professor.

d) With respect to the assertions of pre-act salary disparity, the district court found that in the early 70's the University of Wisconsin-Madison responded by establishing an affirmative action program and making some 424 salary adjustments.

There was no statistical evidence presented by Namenwirth that would have shown any significance in the assertion that Namenwirth was the only female on

tenure track in 35 years in the department. In fact there were few appointments in total during that period, the appointments were in different specialities and there was no showing of any statistical disparity in the appointment of any of the faculty during the 35-year period.

The significance of the finding concerning discrimination in salary to a single female faculty member between 1937 and 1969, when she retired as a full professor, is not shown statistically. The district court simply found that this was an example of the pre-act policy at various universities. Prior to at least 1972, this was not discrimination under Title VII, and in any event, as the district court further found, was addressed and remedied by the university in the early 1970's. The district

court's finding on this point identified Professor Abrahamson, a department member opposed to Namenwirth's tenure, and presumably one of the inherently discriminatory males, as a participant in the salary adjustment efforts.

f) Petitioner attempted to show that some form of sexual bias was present among the member of at least one of the Divisional Committees, by offering testimony of a statement heard, out of context, from some unidentified person to the effect "but Nellie was such a lady." The district court considered this evidence specifically and concluded no significance could be attributed to the remark.

g) The district court made findings on the assertion that Namenwirth did not have an "advocate" as some of the male faculty members had. An "advocate"

in this context was simply a faculty member who, without any formal appointment or designation, was outspoken in support of a particular candidate. The district court did find that Namenwirth had supporters, including the other members of the developmental biology faculty who voted for her tenure. Namenwirth also spoke in her own behalf. The district court found that although the standards for awarding tenure had remained the same, the application had become more exacting beginning in the early 70's due to a lessening of available funds and positions.

i) The district court did not make any findings on the line of testimony presented by Namenwirth, and objected to by the university, that the male members of the department, and the male members

of the Divisional Committees, were inherently incapable of fairly judging Namenwirth because of their sex, and due to their conditioning prior to attaining the age of four. This contention, which might be characterized as "stereotypical sexism" was presented through a female sociologist who asserted, without any specific knowledge of any particular faculty member, that males in general are incapable of making fair judgments concerning females. [Tr. 10-8; 10-39; 10-58.] This same witness asserted that comments about Namenwirth's style of dress and weight, negative but true, attributed to male faculty member Lilien were evidence of sexist intent, because Namenwirth was female, but that the same type of comments made by Lilien about male colleagues were not evidence of sexual intent or evidence of evenhanded

treatment because only males who are performers or gay are concerned about their weight or dress. [Tr. 10-114.] The witness testified that she derived this conclusion from a dictionary of some thirty-six thousand (36,000) terms that presumably a male could not use without being accused of having a sexually biased intent. [Tr. 10-111.]

The district court had the discretion to ignore this "expert" opinion and did so properly.

As is often the case, events that were unremarkable at the time took on sinister proportions after the tenure denial. A chance meeting with Professor Auerbach, who was by any account an early, if wavering, supporter of Namenwirth's tenure, eliciting correct advice from him that it would be better if Namenwirth published some research

from her initial grant before she sought renewal of the grant, was transformed into a discriminatory action on Auerbach's part to deter her from applying for any continuing research. Professor Sonneborn's often unresponsive reaction to male and female colleagues, generally acknowledged as part of his disposition, becomes in retrospect discriminatory behavior directed at Namenwirth.

The petition does not present any matter warranting certiorari. The district court simply performed its function in winnowing out the wheat from the incredible volume of chaff presented in this case, and made appropriate findings in accordance with the dictates of McDonnell and Furnco.

Petitioner's contentions that she was the only female to be hired for

tenure track in the department in a 35-year period and the only person to be actually rejected for tenure from the department mean nothing without other determinations of a statistical nature that were not presented. The total number of tenure decisions over a ten-year period was small, and in diverse fields. Namenwirth was rejected by the Divisional Committee. Lilien had been previously rejected by a prior Divisional Committee, but had applied for tenure prior to the last year. Namenwirth had specifically requested that her consideration be delayed until the last year. Timothy Moermond was in the process of being rejected until the grant approval swayed enough votes to carry his tenure. Nor did Namenwirth account for persons who may have left without a

formal rejection of tenure during that time.

The district court specifically found that the tenure decisions had tightened during the intervening years, and in particular since the early '70's. That is at least one reason for the tenure rejection in 1977. Certainly Namenwirth's skimpy and inconclusive assertion, which was not shown to have any statistical significance, does not trigger a test different from that applied by the district and circuit courts under McDonnell.

CONCLUSION

If there is anything that is disingenuous, it is the petitioner's assertion that an articulated reason for denial of tenure in this context can be "reasonable, true, genuine, not

arbitrary" and still be "pretextual." [Pet. p. 34.] Unlike the theoretical proposition described by the circuit court, if the assertion that Namenwirth did not meet the standards for tenure at the university at Madison is true and genuine, it removes all indirect proof of discrimination. Only a determination that Namenwirth had met the standards for tenure and still was not tenured would fit the circumstances identified by the circuit court. Such a scenario was not present in this matter. Here a finding that the reason was "true, genuine, reasonable" necessarily eliminates pretext.

While it is possible to quibble with the choices of words used by the district court, it is clear that the district court concluded, after considering an extensive record, that there was no sex

discrimination in the denial of tenure to Namenwirth. As this court held in Anderson, the trial on the merits should be the "main event." The findings of fact and conclusions made by the district court were reasonable and sufficient, without semantic exegesis, and were reviewed and upheld by the circuit court. Further review should be denied and this matter finally concluded.

Respectfully submitted,

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